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Supreme Court, U. S.

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No. 98-591

In the
Supreme Court of the United States

OCTOBER TERM, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONER

Corbett Gordon
Counsel of Record
Heidi Guettler
Richard R. Meneghello
Kelliss Collins
Corbett Gordon & Associates, P.C.
1001 SW 5th Avenue, Suite 1600
Portland, Oregon 97204
(503) 242-4262
Counsel for Petitioner

5918

QUESTIONS PRESENTED

1. Whether a monocular individual is "disabled" under the Americans with Disabilities Act ("ADA").
 - a) Whether a monocular individual is, per se, substantially limited in the major life activities of working and seeing under the ADA.
 - b) Whether a remark that a monocular driver is blind in one eye supports a claim that an employer regards that individual as disabled under the ADA.
2. Whether a monocular driver of a commercial motor vehicle is "qualified" when he does not meet a business related standard set by the employer.
3. Whether an employer must adopt an experimental vision waiver program as a means of "reasonable accommodation."

List of Parties

The parties before the Court, and the parties to the proceeding below are identical.

Corbett Gordon Attorneys for Albertsons, Inc.
Heidi Guettler
Richard R. Meneghello
Kelliss Collins
Corbett Gordon & Associates, P.C.
1001 S.W. 5th Avenue, Suite 1600
Portland, Oregon 97204
(503) 242-4262

Richard C. Busse Attorneys for Hallie Kirkingburg
Scott N. Hunt
Busse & Hunt
621 S.W. Morrison, Suite 521
Portland, Oregon 97205
(503) 248-0504

Rule 29.1 Listing

Albertsons has no parent companies or nonwholly owned subsidiaries to list.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
RULE 29.1 LISTING	ii
TABLE OF CONTENTS	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
<u>Relevant Statutes, in Pertinent Part</u>	2
<u>Relevant DOT Regulations, in Pertinent Part</u>	4
STATEMENT OF THE CASE	5
<u>Facts</u>	5
<u>Proceedings Below</u>	10
SUMMARY OF ARGUMENT	13
<u>Relevant History</u>	13
<u>ADA Protections</u>	14
ARGUMENT	17
I. <u>Kirkingburg Is Not Disabled</u>	17
A. Not substantially limited in a major life activity	17
1. Not limited in the major life activity of	

working	18
a. Not precluded from a broad range of jobs	19
2. Not limited in the major life activity of seeing	21
a. Need to look at normal, daily activities that an individual can perform	21
b. Cannot ignore long term impact of impairment	23
B. Albertsons did not regard Kirkingburg as disabled.	25
1. Not treated as being substantially limited in any major life activity	26
2. Attitudes of others did not affect Kirkingburg's physical impairment	28
II. <u>Kirkingburg Is Not Qualified.</u>	28
A. Kirkingburg cannot satisfy the prerequisites of the position.	29
B. Kirkingburg could not perform the essential functions of the job.	32

1. Not required to lower its qualitative standards, or justify them	32
2. Objective evidence demonstrates that driving a truck in interstate commerce is an essential function	35
C. Employing Kirkingburg is a direct safety threat	36
III. <u>Albertsons Satisfied Any Duty it Had to Reasonably Accommodate Kirkingburg.</u>	41
A. Kirkingburg is not an "otherwise qualified" individual with or without reasonable accommodation.	42
B. Waiving minimum requirements is not a reasonable accommodation.	44
C. No obligation to reassign as a reasonable accommodation	46
D. No reasonable accommodation required in cases where an individual is "regarded" as disabled.	48
CONCLUSION	48

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Advocates for Highway Safety v. Federal Highway Administration</i> , 29 F.3d 1288 (CA5 1994)	10
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975)	18
<i>Bragdon v. Abbott</i> , 524 U.S. 624, 118 S.Ct. 2196, (1998)	20, 26, 30, 37, 40
<i>Campbell v. Federal Express Corp.</i> , 918 F.Supp. 912 (D.Md 1996).....	30, 31, 32
<i>Chandler v. City of Dallas</i> , 2 F.3d 1385 (CA5 1993), <i>cert. denied</i> , 511 U.S. 1011 (1994)	38
<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	17, 18, 46
<i>Collier v. City of Dallas</i> , No. 86-1010, slip. op. (CA5 1986) (unpublished)	38
<i>Daugherty v. City of El Paso</i> , 56 F.3d 695 (CA5 1995) <i>cert. denied</i> , 516 U.S. 1172 (1996)	40, 47
<i>Doane v. City of Omaha</i> , 115 F.3d 624 (CA8 1997)	24
<i>EEOC v. Amego, Inc.</i> , 110 F.3d 135 (CA5 1997)	33
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971)	18

<i>Maulding v. Sullivan</i> , 961 F.2d 694 (CA8 1992) <i>cert. denied</i> , 507 U.S. 910 (1993)	21
<i>Milton v. Scrivner</i> , 53 F.3d 1118 (CA10 1995)	33
<i>Monette v. Electronic Data Systems</i> , 90 F.3d 1173 (CA6 1996)	46
<i>Myers v. Hose</i> , 50 F.3d 278 (CA4 1995)	40
<i>School Board of Nassau County v. Arline</i> , 480 U.S. 273 (1987)	25, 37
<i>Sherrod v. American Airlines, Inc.</i> , 132 F.3d 1112 (CA5 1998)	27
<i>Still v. Freeport-McMoran, Inc.</i> , 120 F.3d 50 (CA5 1997)	22
<i>Thompson v. Holy Family Hospital</i> , 121 F.3d 537 (CA9 1997)	27
<i>Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.</i> , 435 U.S. 519 (1978)	34

<u>Statutes</u>	<u>Page</u>
28 U.S.C. § 1254(1).....	2
28 U.S.C. § 1331	11
29 U.S.C. § 701, <i>et seq.</i>	26
42 U.S.C. § 12101, <i>et seq.</i>	10-11
42 U.S.C. § 12101(b)(1)	47
42 U.S.C. § 12102(2)	2, 17
42 U.S.C. § 12111(3)	4

42 U.S.C. § 12111(8)	3, 14, 16, 29, 35, 46
42 U.S.C. § 12111(9)	46
42 U.S.C. § 12112(a)	2, 17
42 U.S.C. § 12113(a)	3
42 U.S.C. § 12113(b)	4, 36
42 U.S.C. § 12116	17
49 U.S.C. § 31136(a)(3)	44
FL ST § 440.15	47
O.R.S. § 659.420	47

Legislative History

Page

S.Rep. No. 101-116, 101st Cong., 1st Sess. (1989) (Senate Labor and Human Resources Committee)	29-30, 31, 37-38, 43
--	----------------------

H.R.Rep. No. 101-485(II), 101st Cong., 2d Sess. (1990) (House Education and Labor Committee), reprinted in 1990 U.S.C.C.A.N. 303	31, 45
--	--------

H.R.Rep. No. 101-485(III), 101st Cong., 2d Sess. (1990) (House Judiciary Committee), reprinted in 1990 U.S.C.C.A.N. 445	36-37
---	-------

Regulations

Page

29 C.F.R. § 1630.2(i)	18, 21
29 C.F.R. § 1630.2(j)(1)	18
29 C.F.R. § 1630.2(j)(1)(ii)	24
29 C.F.R. § 1630.2(j)(2)	23
29 C.F.R. § 1630.2(j)(3)(i)	19
29 C.F.R. § 1630.2(j)(3)(ii)	19
29 C.F.R. § 1630.2(l)	26, 27
29 C.F.R. § 1630.2(l)(1)	26

29 C.F.R. § 1630.2(l)(2)	28
29 C.F.R. § 1630.2(m)	29
29 C.F.R. § 1630.2(n)(1)	32
29 C.F.R. § 1630.2(n)(2)	32
29 C.F.R. § 1630.2(n)(3)	35
29 C.F.R. § 1630.2(r)	36, 37
29 C.F.R. § 1630.9	48
49 C.F.R. §§ 350-399	5
49 C.F.R. § 390.3(d)	5, 34
49 C.F.R. §§ 391.41-391.49	5
49 C.F.R. § 391.41(a)	8
49 C.F.R. § 391.41(b)(10)	4, 8, 14, 44, 45

Interpretive Guidance

Page

29 C.F.R. Pt. 1630, App. § 1630.2(i)	18
29 C.F.R. Pt. 1630, App. § 1630.2(j)	22, 23
29 C.F.R. Pt. 1630, App. § 1630.2(l)	25, 28
29 C.F.R. Pt. 1630, App. § 1630.2(m)	29, 42
29 C.F.R. Pt. 1630, App. § 1630.2(n)	32-33
29 C.F.R. Pt. 1630, App. § 1630.2(r)	39
29 C.F.R. Pt. 1630, App. § 1630.9	42-43
29 C.F.R. Pt. 1630, App. § 1630.9(a)	48

EEOC Publications

Page

EEOC ADA Case Study Training Manual (1996)	48
--	----

EEOC Compliance Manual, § 915.002 (reissued Mar. 14, 1995)	20
--	----

EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act (Jan. 1992)	30, 33, 48
---	------------

<u>Federal Register - Qualification of Drivers</u>	<u>Page</u>
57 Fed. Reg. 6793 (1992)	45
57 Fed. Reg. 10295 (1992)	9
57 Fed. Reg. 23370 (1992)	45
57 Fed. Reg. 31458 (1992)	9, 41
59 Fed. Reg. 59386 (1994)	41
63 Fed. Reg. 41769 (1998)	5
 <u>Miscellaneous</u>	 <u>Page</u>
R.V. North, <i>The Relationship Between the Extent of Visual Field and Driving Performance - A Review</i> , 5 Ophthalmic Physiol. Opt. No. 2 at 205, 209 (1985)	6
WEBSTER'S II NEW COLLEGE DICTIONARY (2d ed. 1995)	39

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No. 98-591

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Hallie Kirkingburg, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (J.A. 220) is reported at 143 F.3d 1228 (1998). By order entered July 8, 1998, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc (J.A. 267). The opinions of the district court (J.A. 115-122, 127-129) are unreported.

JURISDICTION

On May 11, 1998, the United States Court of Appeals for the Ninth Circuit entered its order and opinion in this case. On July 1, 1998, the United States Court of Appeals for the Ninth Circuit entered its order and amended opinion in

this case. The United States Court of Appeals for the Ninth Circuit entered its order denying the petition for rehearing of Albertsons, Inc., and the suggestion for rehearing en banc on July 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant Statutes, in Pertinent Part

42 U.S.C. § 12102(2)

(2) Disability

The term "disability" means, with respect to an individual--

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of that individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

42 U.S.C. § 12112(a)

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and

other terms, conditions, and privileges of employment.

42 U.S.C. § 12111(8)

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12113(a),(b)

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such

performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

42 U.S.C. § 12111(3)

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

Relevant DOT Regulations, in Pertinent Part

49 C.F.R. § 391.41(b)(10)

(b) A person is qualified to drive a commercial motor vehicle if that person--

- (10) Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40(Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or

without corrective lenses, field of vision of at least 70° in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

49 C.F.R. § 390.3(d)

- (d) Nothing in [49 C.F.R. §§350-399] shall be construed to prohibit an employer from requiring and enforcing more stringent requirements relating to safety of operation and employee safety and health.

STATEMENT OF THE CASE

Facts

Since 1939, the United States has enforced safety standards for commercial truck drivers who operate motor vehicles on the country's highways. These standards have always required drivers to have good eyesight. The minimum visual acuity standard was set at 20/40 in each eye in 1970 and remains unchanged to this day. Qualification of Drivers, 63 Fed. Reg. 41769, 41770 (1998) (to be codified at 49 C.F.R. Pt. 391) (proposed Aug. 5, 1998).

Albertsons, a grocery chain, dispatches truck drivers from large warehouses via interstate commerce to its retail stores. Because of safety and liability concerns, Albertsons has always required its truck drivers to meet the minimum DOT vision acuity standard of 20/40 in each eye. 49 C.F.R. §§ 391.41 - 391.49. The Company has never knowingly relaxed its policy (J.A. 53, 55).

On August 21, 1990, Albertsons, Inc. ("Albertsons" or "the Company") hired Hallie Kirkingburg as a truck driver at the Portland, Oregon Distribution Center -- a large warehouse from which grocery product is dispatched by trucks to Albertsons' retail grocery stores in three states (J.A. 49, 331).

The Department of Transportation's ("DOT") Motor Carrier Safety Regulations require that all over-the-road truck drivers be physically qualified to drive. Qualification includes vision standards with a minimum acuity score of 20/40 corrected in each eye. Albertsons requires all drivers to meet the minimum DOT vision standards.

Kirkingburg claims he was born with vision in his left eye of 20/200 that has not changed (J.A. 12, 35). The reduced acuity in his left eye is due to amblyopia, a condition marked by low or reduced visual acuity (J.A. 35). The condition is not correctable by eyeglasses or contact lenses (J.A. 35) and causes loss of peripheral vision and depth perception.¹

Despite his amblyopia, Kirkingburg worked steadily before his employment with Albertsons. He worked on and off as a truck driver from 1974-1990, and drove a truck as a garbage hauler from approximately 1981 through 1989. He worked as an auto mechanic from approximately 1968 through 1979. Before that, Kirkingburg worked as a jet aircraft mechanic and, later, crew chief to a basic air commander in the U.S. Air Force from approximately 1957 through 1960 (J.A. 11, 137-138, 287-288).

Before Kirkingburg was employed by Albertsons, the DOT certified clinic to which the Company sends applicants

¹ R.V. North, *The Relationship Between the Extent of Visual Field and Driving Performance - A Review*, 5 Ophthalmic Physiol. Opt. No. 2 at 205, 209 (1985).

and employees for medical evaluation erroneously certified him (J.A. 360). On August 18, 1990, an examination revealed that he had acuity ratings, corrected with eyeglasses, of 20/25 in the right eye and 20/70 (a failing grade) in the left eye (J.A. 360). That medical examiner incorrectly certified that Kirkingburg met the DOT minimum safety requirements. A second examination, on February 5, 1991, while he was an employee revealed that Kirkingburg had acuity ratings, corrected with eyeglasses, of 20/25 in the right eye and 20/100 (a failing grade) in the left eye (J.A. 361). That medical examiner also incorrectly certified that Kirkingburg met the requirements under the Motor Carrier Safety Regulations. Albertsons has historically deferred to the medical reports provided by a DOT certified clinic having no prior reason to believe that the examination results were inaccurate (J.A. 56).

On December 3, 1991, Kirkingburg sustained an on-the-job injury when he fell from the cab of his truck (J.A. 5, 274). Kirkingburg was released to return to work in November of 1992 (J.A. 12-13). In accordance with company policy, Albertsons required Kirkingburg to be DOT recertified before returning to work from the long-term injury (J.A. 350).

On November 6, 1992, Kirkingburg was correctly found to have an acuity rating of 20/20, corrected, in the right eye and 20/200 (a failing grade) in the left eye (J.A. 357). The medical examiner advised Albertsons' Transportation Department that Kirkingburg failed to meet the vision requirements under DOT minimum safety standards and could not be certified (J.A. 341-342, 357).

Despite not having the requisite DOT certificate, Kirkingburg asked to return to work as a driver (J.A. 18). Frank Riddle, General Manager of the Distribution Center, reviewed Kirkingburg's DOT file and confirmed that

Kirkingburg's visual acuity failed to meet DOT minimum safety requirements (J.A. 314). Additionally, Kirkingburg failed to meet the requirements set forth in Albertsons' Driver Manual, which states in pertinent part, "[a]s an Albertson's driver, you are required to comply with all Department of Transportation, Interstate Commerce Commission and Company safety rules." (J.A. 332-333).

On November 20, 1992, Kirkingburg was terminated from Albertsons as he was not qualified for the position of truck driver because he did not meet the minimum DOT safety requirements (J.A. 365-366). In fact, Kirkingburg was never qualified and should never have been allowed to drive for Albertsons at all because he had never met the vision requirements set forth in 49 C.F.R. § 391.41(a) and (b)(10)). In the context of discussing what it was about Kirkingburg's vision that caused the Company concern, Riddle noted that Kirkingburg was "legally blind, or blind in one eye." (J.A. 341).

While Albertsons did not believe Kirkingburg was qualified to drive a commercial vehicle, it considered him for and offered him two other jobs (J.A. 53). Albertsons offered Kirkingburg the position of Yard Hostler, moving trailers at the Distribution Center. After Albertsons made the Yard Hostler offer, but before he responded, the Company realized that the position also required DOT certification, and withdrew that offer (J.A. 345, 395). The Company also offered Kirkingburg the position of Tire Mechanic, changing and repairing truck tires (J.A. 53). Kirkingburg refused the Tire Mechanic position (J.A. 53).² Shortly after being

² Albertsons also encouraged Kirkingburg to apply for a position in the warehouse (J.A. 54-55).

terminated, Kirkingburg secured employment as a truck driver with Pestega Trucking (J.A. 282).

In July 1992, the Federal Highway Administration ("FHWA") commenced an experimental vision waiver study program. Qualification of Drivers, 57 Fed. Reg. 31458 (1992). This program granted experimental waivers to drivers who failed to meet the minimum visual acuity standards set forth in the DOT regulations. *Id.* The FHWA's stated purpose of the experimental waiver study program was to "provide objective data to be considered in relation to a rulemaking exploring the feasibility of relaxing the current absolute vision standards in 49 C.F.R. Pt. 391 in favor of a more individualized standard." Qualification of Drivers, 57 Fed. Reg. 10295 (1992). The experimental study was undertaken to test the "efficacy" of the regulatory vision requirements. Qualification of Drivers, 57 Fed. Reg. 31458, 31459 (1992).

The standards for participating in the experimental vision waiver program were that applicants: (a) had a license to operate a commercial motor vehicle; (b) had three years' minimum experience driving a commercial vehicle; (c) during that three year period, the applicant operated a commercial vehicle without certain moving violation citations, license suspension, or driving-related convictions; and (d) were examined by an optometrist or ophthalmologist who performed certain tests and reported that the applicant was "able to perform the driving tasks required to operate a commercial motor vehicle." Qualification of Drivers, 57 Fed. Reg. 31458, 31460 (1992).³

³ In certifying that Kirkingburg met the vision requirements, his optometrist relied on information in a treatise and never made specific inquiry about Kirkingburg's driving conditions. She failed to consider factors that affect a monocular driver such as low light, shadows, and

The DOT has never required employers to accept experimental vision waivers. Albertsons' consistent policy is to employ only those drivers who meet or exceed the standard minimum DOT safety regulations, and not to accept DOT experimental waivers for vision (J.A. 53, 55). Albertsons made the business decision not to accept experimental waivers because of its concern for the safe operation of its vehicles (J.A. 330). The DOT standard minimum safety requirements for vision remain unchanged and have not been affected by the experimental waiver program.

Kirkingburg requested that the Company assist him in obtaining an experimental waiver (J.A. 369). Albertsons did not (J.A. 145). Kirkingburg obtained an experimental vision waiver from the DOT and, on February 2, 1993, requested to drive a truck for Albertsons (J.A. 145). Albertsons did not rehire Kirkingburg as a truck driver because it did not accept experimental vision waivers.⁴

Proceedings Below

Kirkingburg filed a complaint in the United States District Court for the District of Oregon alleging that Albertsons violated the Americans with Disabilities Act, 42

other specific driving conditions (J.A. 302-306).

⁴ On August 2, 1994, the experimental vision waiver program was invalidated by the Court of Appeals for the District of Columbia in *Advocates for Highway Safety v. Federal Highway Administration*, 28 F.3d 1288, 1294 (CA DC 1994). The court found the FHWA adopted the experimental waiver program contrary to law because it failed to determine that an experimental waiver was consistent with the safe operation of commercial motor vehicles. *Id.*

U.S.C. § 12101, *et seq.* ("ADA"), by failing to accommodate him by: 1) not waiting a reasonable time to allow Kirkingburg to obtain an experimental vision waiver; 2) not allowing plaintiff to return to work once he received the experimental waiver; and 3) not reassigning him to other suitable work. The jurisdiction of the District Court was invoked under the ADA, 42 U.S.C. § 12101, *et seq.*, and under 28 U.S.C. § 1331 (J.A. 4-6).

Albertsons filed for summary judgment on the ground that Kirkingburg was not a qualified individual, with or without reasonable accommodation, under the ADA because he could not meet the DOT minimum safety vision standards (J.A. 39-48).

The District Court granted Albertsons' Motion for Summary Judgment, holding that: 1) Kirkingburg was not a qualified individual under the ADA because he could not perform the essential functions of the job; 2) a leave of absence to obtain an experimental vision waiver was not a reasonable accommodation, as such accommodation would be futile; 3) the ADA does not obligate Albertsons to employ truck drivers with experimental vision waivers; and 4) Albertsons may rely on the DOT vision standards and need not make an individual assessment of Kirkingburg's ability to drive (J.A. 115-122).

Kirkingburg filed a Motion for Reconsideration with the District Court on the ground that the court did not address whether one form of reasonable accommodation would have been to reassign Kirkingburg to a Yard Hostler position (or to another available and suitable position) (J.A. 123). The District Court denied Kirkingburg's Motion, stating that he failed to provide evidence that the Yard Hostler position was available when he was terminated and that since driving was an essential part of that position, this accommodation would be futile (J.A. 127-128).

Kirkingburg appealed to the United States Court of Appeals for the Ninth Circuit (J.A. 130). By a two to one vote, the Ninth Circuit reversed the District Court's decision and remanded the case for trial. The Ninth Circuit held: 1) Kirkingburg was disabled under the ADA and its implementing regulations, if the facts were as he alleged; 2) there was a genuine issue of material fact whether Albertsons regarded Kirkingburg as disabled; 3) Kirkingburg was a qualified individual under the ADA, because he established a genuine issue of material fact with respect to whether he could perform the essential functions of a commercial truck driver; 4) by refusing to accept the experimental waiver, Albertsons chose to adhere to only a portion of the federal regulations; 5) Albertsons was not free to disregard the experimental waiver program for the reason it asserted at the time of Kirkingburg's termination, because there was no evidence that Albertsons believed the experimental waiver program to be invalid; and 6) Albertsons failed to produce any evidence that Kirkingburg and other experimental waiver recipients posed a direct safety threat (J.A. 220-249).

The dissent stated: 1) Kirkingburg failed to show he could perform the essential functions of his job because he did not meet the minimum DOT vision requirements; 2) the ADA does not require Albertsons to accept an experimental waiver that the FHWA had not found to be consistent with the safe operation of commercial motor vehicles at the time of Kirkingburg's termination; and 3) since Albertsons offered to accommodate Kirkingburg's disability with the offer of another job, which Kirkingburg rejected, it fulfilled its ADA obligations (J.A. 249-254).

Albertsons filed a Petition for Rehearing and Suggestion for Rehearing En Banc (J.A. 255-266), which was denied on July 8, 1998 (J.A. 267).

Albertsons filed a Petition for a Writ of Certiorari on

October 6, 1998, seeking review of the Ninth Circuit's decision. The Court granted review on January 8, 1999.

SUMMARY OF ARGUMENT

The Ninth Circuit's approach in this case is fundamentally at odds with the language and the purpose of the ADA in two respects: 1) under the Ninth Circuit's reasoning, all vision impaired individuals are disabled because they see in a "different" manner; and 2) under the Ninth Circuit's reasoning, the judgment of the court or jury is substituted for the business judgment of the employer in determining who is qualified.

Relevant History

- Since 1970, the DOT has maintained minimum visual safety standards at 20/40 corrected acuity in each eye.
- Albertsons has never considered any truck driver who cannot meet the DOT minimum safety standards to be qualified to drive a truck for the Company.
- The DOT instituted an experimental vision waiver program in 1992, that permitted certain individuals without 20/40 acuity in each eye to obtain a vision waiver.
- Albertsons discovered Kirkingburg had 20/200 uncorrectable vision in his left eye, and terminated him from a truck driver position.
- Kirkingburg obtained a vision waiver pursuant to an experimental program that allowed certain visually impaired individuals to be provisionally certified.
- Despite the experimental waiver, his vision still fell far short of the minimum DOT safety standards.
- Kirkingburg claimed the Company terminated him in

violation of the ADA, which prohibits discrimination against qualified individuals with a disability.

ADA Protections

- Kirkingburg is not entitled to ADA protection because he is neither "qualified" nor "disabled."

Qualified

- The ADA expressly recognizes that consideration shall be given to the employer's judgment in determining who is qualified. 42 U.S.C. § 12111(8).
- To be qualified, an individual must be able to perform the essential functions of the position with or without reasonable accommodation. An employer has the right to set any job-related standard consistent with business necessity. The ADA was not intended to second-guess an employer's business judgment.
- An essential function of Kirkingburg's position was driving a truck in interstate commerce.
- Kirkingburg failed to meet Albertsons' objective standard requiring all truck drivers to satisfy minimum vision standards set forth in 49 CFR § 391.41(b)(10). Thus, he is not "qualified" under the ADA.

Disabled

- The ADA defines "disability" as a physical impairment that substantially limits one or more of the major life activities of an individual.
- Kirkingburg claims that his monocular vision renders him disabled. He argues that he is substantially

limited in both "working" and "seeing."

working

- In order to be substantially limited in working, Kirkingburg must show he is significantly restricted from performing a broad range of jobs. To the contrary, his vision has never prevented him from doing any work he has wanted to do, other than driving a truck for Albertsons.
- Kirkingburg held numerous driving jobs before and after his termination. Thus, he is not precluded from a broad range of jobs.

seeing

- Kirkingburg's long and consistent job history demonstrates he is not substantially limited in the major life activity of seeing.
- The regulatory context for assessing the manner in which a person performs a life activity requires that the individual be "substantially restricted," not that his or her manner of seeing "differs substantially," the standard applied by the Ninth Circuit. The Ninth Circuit found that Kirkingburg was substantially limited in the major life activity of seeing because the manner in which someone with monocular vision sees is "different" than a person with binocular vision.
- The status of being "different," even substantially different, is not germane to an employment-related inquiry under Title I of the ADA.

Regarded as

- There is no genuine issue of material fact whether Albertsons regarded Kirkingburg as disabled.
- Albertsons regarded Kirkingburg as being able to work and see, since it offered him other job opportunities.
- The Company regarded him as not qualified for an essential function of a job as a truck driver.
- A comment by the General Manager that Kirkingburg was legally blind in one eye was not related to the decision to terminate his employment. Absent a causal link to the decision to terminate Kirkingburg's employment, this statement cannot support a claim that he was regarded as disabled.

Reasonable Accommodation

- The ADA examines whether an individual "can perform the essential functions of the employment position" under consideration. 42 U.S.C. § 12111(8). Because Kirkingburg was not qualified for the position of truck driver for the Company, it had no further duty under the ADA to accommodate him.
- The Ninth Circuit held that Albertsons should have accepted Kirkingburg's vision waiver as a reasonable accommodation and re-hired or reinstated him as a truck driver. This decision unfairly restricts a company's ability to set its own standards related to an essential function of the job, will have a chilling effect on national commerce, and should be reversed.
- No reasonable accommodation was required under the circumstances, but if this Court finds that Albertsons had an obligation to offer Kirkingburg some other

available and suitable job, it did so. When Kirkingburg rejected this offer, he lost protection of the ADA even under the broadest possible interpretation of the statute.

ARGUMENT

I. Kirkingburg Is Not Disabled.

The ADA states that no employer shall discriminate against a qualified individual with a disability because of the disability in regard to termination of employment. 42 U.S.C. § 12112(a). The ADA defines disability as a "physical . . . impairment that substantially limits one or more of the major life activities of that individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2).

While Kirkingburg may have a "physical impairment" due to his amblyopia, the Ninth Circuit erred when it ruled that Kirkingburg was substantially limited in the major life activities of working or seeing, and that Albertsons regarded him as having such an impairment.

A. Not substantially limited in a major life activity

The EEOC Regulations⁵ state that substantially

⁵ The ADA expressly directed the EEOC to draft regulations to carry out Title I (the employment discrimination provisions) of the ADA. 42 U.S.C. § 12116. This Court has said that "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,

limited means that a person is "[u]nable to perform a major life activity that the average person in the general population can perform" or is "[s]ignificantly restricted as to the . . . manner under which an individual can perform a major life activity" when compared with the average person. 29 C.F.R. § 1630.2(j)(1).

1. Not limited in the major life activity of working

The ADA does not define the term "major life activities," but the EEOC has characterized this term as encompassing "... those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. Pt. 1630, App. § 1630.2(i) (Interpretative Guidance)⁶. The EEOC Regulations provide a list of major life activities falling under this rubric, that includes "working." 29 C.F.R. § 1630.2(i). The EEOC Regulations list several factors to consider when determining if an individual is substantially limited with respect to the major life activity of "working." One factor to be considered is whether an individual is:

... significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in

843-844 (1984).

⁶ This Court has generally deferred to administrative interpretations. *Chevron* at 844. Specifically, with regard to EEOC interpretations, this Court has said, "... they do constitute the administrative interpretation of [a statute] by the enforcing agency, and consequently they are entitled to a great deference." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975), citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971).

various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i).

a. Not precluded from a broad range of jobs

By simply asserting that he cannot drive a truck for Albertsons, Kirkingburg has not shown that he is precluded from a broad range of jobs in the geographic area where he lives, based on his inability to pass DOT minimum safety regulations.⁷

To the contrary, Kirkingburg held other jobs involving driving both before and after he worked for Albertsons.⁸ Apparently, none of those employers had the same minimum safety standards as Albertsons. This demonstrates that not being able to work for Albertsons as a truck driver is not the same as being substantially limited in

⁷ The EEOC has suggested that among the factors which may be considered in determining whether an individual is substantially limited in the major life activity of working are the number of jobs that the individual is disqualified from in the immediate geographic area because of the impairment, and the number of jobs still available despite the impairment. 29 C.F.R. § 1630.2(j)(3)(ii).

⁸ Kirkingburg worked as a truck driver from approximately 1974 through 1981, and again in 1990, and worked driving as an independent garbage hauler from approximately 1981 through 1989. After being terminated from Albertsons, he worked as a truck driver for Pestega Trucking.

the major life activity of working.

In the EEOC Compliance Manual⁹, the EEOC examines whether someone with a vision impairment is substantially limited in the major life activity of working. The EEOC provides examples about two different individuals with vision problems, concluding that one individual is substantially limited in the major life activity of working, while the other is not. EEOC Compliance Manual, §915.002, at pp. 902-24 - 902-25 (reissued Mar. 14, 1995).

In the first example, a computer programmer with a vision impairment cannot distinguish characters on the computer screen without accommodation. The impairment precludes her from working as a computer programmer, a systems analyst, a computer instructor, and a computer operator. Therefore, she is substantially limited in the major life activity of working because her impairment prevents her from working in the broad range of jobs requiring the use of a computer.

In the second example, a computer programmer with a vision impairment can distinguish characters on most computer screens. The impairment prevents her from distinguishing characters on a particular type of computer screen used by her employer. Since this impairment only prevents her from being a computer programmer for a particular employer, she is not substantially limited in the major life activity of working.¹⁰

⁹ This Court has previously drawn guidance from the views expressed by the EEOC published in its Compliance Manual. *Bragdon v. Abbott*, 524 U.S. 624, ___, 118 S.Ct. 2196, 2209 (1998).

¹⁰ The first example does not apply -- it would apply only if Kirkingburg were not able to see well enough to drive at all and was, therefore, unable to hold any job involving driving.

Kirkingburg's situation is analogous to the second example. Because Albertsons does not accept any experimental DOT waiver for vision and strictly applies the DOT minimum safety regulations, Kirkingburg is precluded from driving a truck for a particular employer -- Albertsons.

Therefore, Albertsons respectfully requests that this Court reject the reasoning of the Ninth Circuit and follow the guidance provided by the EEOC, adopted by several federal appellate courts¹¹ and hold that Kirkingburg is not substantially limited in the major life activity of working because he is not significantly restricted in his ability to perform a broad range of jobs.

2. Not limited in the major life activity of seeing

Another major life activity expressly enumerated by the EEOC is "seeing." 29 C.F.R. § 1630.2(i). Just as Kirkingburg is not substantially limited in the major life activity of working, an analysis of the 20/200 vision in his left eye and the activities he can perform should lead this Court to hold that he is not substantially limited in the major life activity of seeing.

a. Need to look at normal, daily activities that an individual can perform

Albertsons is not asking the Court to hold that

¹¹ See, for example, *Maulding v. Sullivan*, 961 F.2d 694, 698 (CA8 1992), *cert. denied*, 507 U.S. 910 (1993) (since impairment did not substantially limit plaintiff's employment ability as a whole, she was not substantially limited in working).

monocular individuals are never substantially limited in the major life activity of seeing. The EEOC's Interpretive Guidance correctly suggests that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis . . ." 29 C.F.R. Pt. 1630, App. § 1630.2(j) (Interpretative Guidance). By the same token, Albertsons respectfully requests that the Court reject any suggestion that it adopt a standard by which every monocular individual is held to be substantially limited *per se*, which is the effect of the Ninth Circuit's decision below.

Instead, this Court should examine the visual acuity of the individual involved to determine whether he or she can otherwise perform normal daily activities requiring eyesight. If the individual can perform these activities, despite having a vision impairment, this Court should hold that an individual is not substantially limited in the major life activity of seeing, even if restricted in his or her ability to perform an occasional specific task.

Several federal appellate courts have examined cases involving visually-impaired individuals and have determined that they are not substantially limited in the major life activity of seeing based on the above analysis.

For example, in *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 51 (CA5 1997), an individual who worked as a safety equipment clerk and as a warehouse clerk was blind in one eye. After he was terminated, he brought an ADA claim against his employer, claiming he was substantially limited in the major life activity of seeing. *Id.* The Fifth Circuit noted that the individual's remaining eye functioned at a normal level and that he was also able to perform normal daily activities (including driving) even though his monocular vision limited his peripheral vision. *Id.* at 52. Implicit in *Still* is the conclusion that the individual's vision impairment did not have a significant long term impact, since he could

engage in the same types of activities as an individual with normal sight.

In the instant case, Kirkingburg's monocular vision did not have a significant long term impact on his ability to engage fully in most of the same activities as binocular individuals. He has a long history of holding employment positions requiring the use of eyesight, including truck driver and mechanic, and has even served in the Air Force. In fact, when asked whether his eye impairment has ever interfered with his doing work, or whether he has avoided any types of work because of his eye impairment, Kirkingburg testified, "Not that I recall." (J.A. 275). Although Kirkingburg could not perform the essential functions of the position of truck driver for Albertsons because of his vision impairment, he was not substantially limited in the major life activity of seeing.

b. Cannot ignore long term impact of impairment

The following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2). In this context, the term "impact" refers to the "residual effects of the impairment." 29 C.F.R. Pt. 1630, App. § 1630.2(j) (Interpretative Guidance).

When examining this issue, some courts, including the Ninth Circuit, have simply looked to the nature and duration of the impairment and concluded that the individual examined must be substantially limited in the major life

activity of seeing. These analyses are unsound because they ignore the long term impact of the impairment.

The Ninth Circuit employed this flawed analysis in its review of the instant case. The court stated that an impairment is considered substantially limiting if it "significantly restricts as to the condition, *manner*, or duration under which an individual can perform a particular major life activity as compared to the condition, *manner*, or duration under which the average person in the general population can perform that same major life activity" (J.A. 234) (emphasis in original) (citing 29 C.F.R. §1630.2(j)(1)(ii)). The court then concluded that since the manner in which Kirkingburg sees "differs significantly" from the manner in which most people see, he is substantially limited in seeing. It cited an Eighth Circuit case, *Doane v. City of Omaha*, 115 F.3d 624, 627 (CA8 1997), as support for this proposition.¹²

In *Doane*, the Eighth Circuit ruled that a monocular individual was substantially limited in the major life activity of seeing because "[t]he manner in which [he] must sense depth and use peripheral vision is significantly different from the manner in which an average, binocular person performs the same visual activity." *Id.* However, the Eighth Circuit failed to examine the long term impact that monocular vision has on the individual's life -- for example, how the visual impairment affects the individual's normal daily activities.

The Eighth and Ninth Circuits' analyses eliminate the "substantially limited" portion of the statutory definition and render "disabled" every individual who conducts the manner of his or her life differently than most people. Under the

¹² There is nothing in the record to support the conclusion that the manner in which Kirkingburg sees is any different, other than the fact that the visual acuity in his left eye is 20/200.

flawed analysis, every individual with visual acuity worse (or even better) than the national average would be "disabled" under the ADA because he or she sees in a manner that is "different." Even if a monocular individual sees in a manner that is different, he or she is not necessarily significantly restricted in the major life activity of seeing.

Albertsons respectfully asks this Court to hold that a person is not substantially limited in the major life activity of seeing if he or she can participate in most activities that require visual acuity, and any difference in the manner of seeing does not "significantly restrict" his or her seeing.

B. Albertsons did not regard Kirkingburg as disabled.

The Ninth Circuit Court also erred when it ruled that a genuine issue of material fact existed as to whether Albertsons "regarded" Kirkingburg as being substantially limited in any of the major life activities.

The rationale for the "regarded as" prong in the definition of disability is to protect individuals from deprivations based on myths, fears and stereotypes associated with disabilities. 29 C.F.R. Pt. 1630, App. § 1630.2(l) (Interpretative Guidance). The text of the "regarded as" portion of the statute makes clear that a claim of perceived disability requires some element of misperception or prejudice by the employer. As this Court articulated in the Rehabilitation Act case of *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987), "... society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from

actual impairment.”¹³

The EEOC Regulations define an individual who is “regarded as having such an impairment” as someone who “has a physical . . . impairment that does not substantially limit major life activities but is treated” as such by an employer or “has a physical . . . impairment that substantially limits major life activities only as a result of the attitudes of others toward such an impairment” or is simply “treated . . . as having an impairment,” when the individual does not. 29 C.F.R. § 1630.2(l).

Since Albertsons’ perception of Kirkingburg’s impairment was not based on myths, fears or stereotypes associated with disabilities, but instead upon the objective criterion established for nationwide public safety standards, unchanged for decades, Kirkingburg does not fit into any of the three categories described in the Regulations. 29 C.F.R. § 1630.2(l).

1. Not treated as being substantially limited in any major life activity

First, Kirkingburg’s vision deficiency was not “perceived by the employer . . . as constituting a substantially limiting impairment.” 29 C.F.R. § 1630.2(l)(1). Instead, the opposite is true. Albertsons offered Kirkingburg another job (the position of Tire Mechanic) which would have required him to perform the major life activities of both

¹³ The ADA can be enforced in a manner consistent with the requirements of the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* This Court has acknowledged that it has been directed by Congress to grant at least the same protection to individuals under the ADA as it does to those individuals under the Rehabilitation Act. *Bragdon* at 2202.

working and seeing. Kirkingburg rejected this opportunity.¹⁴

Lower federal courts from many jurisdictions have consistently held that an employer could not have “regarded” an employee as substantially limited in a major life activity when the employer expressly encouraged the employee to engage in that activity by accepting another position of employment. In *Thompson v. Holy Family Hospital*, 121 F.3d 537, 541 (CA9 1997), the Ninth Circuit noted that the employer did not regard a nurse as substantially limited in working where, among other things, it made the nurse aware of other job opportunities at the hospital that did not have the same physical restrictions as her previous job.¹⁵ This reasoning is sound. If an employer truly viewed an employee as being substantially limited in working, that employer would not offer other positions to the employee.

Being perceived by an employer as being unsuitable for one employment position is not enough to raise a “regarded as” claim of disability discrimination. 29 C.F.R. § 1630.2(l). Albertsons’ correct perception of Kirkingburg was that he was only disqualified from performing one type of position -- a position that required him to meet DOT minimum safety regulations.

¹⁴ Albertsons also encouraged Kirkingburg to apply for a position in the warehouse.

¹⁵ See also *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1121 (CA5 1998) (since employer attempted to place employee in other positions where she was not disqualified due to back condition, court held that “[s]uch evidence could only permit a reasonable jury to conclude that [employer] believed [employee] to be qualified for other positions”).

2. Attitudes of others did not affect Kirkingburg's physical impairment

Kirkingburg does not have a physical impairment that is substantially limiting only because of the attitudes of others toward the impairment. 29 C.F.R. § 1630.2(l)(2). The Ninth Circuit, in error and without analysis, relied on a statement made by Kirkingburg's supervisor that Kirkingburg was "legally blind, or blind in one eye" to find a fact issue as to whether Albertsons regarded him as disabled (J.A. 236-237).

A causal connection must exist between the perception of disability and an ultimate employment decision to trigger a "regarded as" claim. Such a claim will be successful only "if an individual can show that an employer . . . made an employment decision because of a perception of disability. . . ." 29 C.F.R. Pt. 1630, App. § 1630.2(l) (Interpretative Guidance).

The attitude displayed by Kirkingburg's supervisor when he referred to Kirkingburg as "legally blind, or blind in one eye" is irrelevant. Albertsons' consistent policy required all truck drivers to meet the minimum DOT standards. Kirkingburg was terminated for failing to meet these standards.

No causal connection exists because Albertsons based its decision on Kirkingburg's failure to meet the minimum safety standards established by the DOT.

II. Kirkingburg Is Not Qualified.

The ADA is structured so that an individual's impairment may not be serious enough to rise to the level of "disability," but may be serious enough to render him or her not "qualified." The ADA defines "qualified individual with

a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). An individual can only be qualified if he or she satisfies the "requisite skill, experience, education and other job-related requirements of the employment position, and who, with or without reasonable accommodation, can perform essential functions of such position." 29 C.F.R. § 1630.2(m).

The ADA provides that consideration shall be given to an employer's judgment in identifying what functions of a job are essential. 42 U.S.C. § 12111(8). The Ninth Circuit held that Kirkingburg was a qualified individual with a disability because he could perform the essential functions of the position of truck driver (J.A. 238). This holding is in error.

A. Kirkingburg cannot satisfy the prerequisites of the position.

The ADA's Interpretive Guidance establishes a two-step process for determining whether an individual is qualified. The first step inquires whether the individual satisfies the prerequisites of the position. 29 C.F.R. Pt. 1630, App. § 1630.2(m) (Interpretative Guidance).¹⁶ Legislative history explains that Congress only intended to consider those prerequisites that are "job-related and consistent with business necessity." S.Rep. No. 101-116, 101st Cong., 1st Sess. 27 (1989) (Senate Labor and Human Resources

¹⁶ The second step inquires whether the individual can perform the essential functions of the position with or without reasonable accommodation, which is discussed in Sections II and III, *infra*.

Committee).¹⁷

Albertsons' prerequisite that all interstate truck drivers meet minimum DOT safety regulations is a job-related business judgment. The Company is committed to placing only safe drivers on interstate highways. Kirkingburg is not qualified because he does not meet the objective prerequisite of the position.

In one particularly well reasoned opinion, a lower federal court found an individual who failed to obtain DOT certification for a driving position, where certification was a prerequisite, was not "qualified" under the ADA. *Campbell v. Federal Express Corp.*, 918 F.Supp. 912, 916 (D.Md. 1996). In *Campbell*, an unsuccessful applicant brought an ADA claim against Federal Express after he was rejected for a driving position. The applicant originally held a position with a rival courier company driving a commercial vehicle, a position that had required him to obtain DOT certification. *Id.* at 914. He then applied for a similar position with Federal Express and underwent the requisite DOT applicant medical examination. *Id.* The applicant failed the second DOT medical examination because of a physical impairment to his hand, and Federal Express did not hire him. *Id.* He brought an ADA claim against Federal Express. *Id.* The claim was dismissed because the applicant could not prove he was "qualified" since he lacked DOT certification in seeking a position where DOT certification was a prerequisite. *Id.* at 920. The court looked to the following ADA legislative

¹⁷ The EEOC has indicated it agrees with this approach. See EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, § 2.3(a), page II-12 (Jan. 1992). This Court has previously drawn guidance from the views expressed by the EEOC published in its Technical Assistance Manual. *Bragdon* at 2209.

history for guidance:

With respect to covered entities subject to rules promulgated by the Department of Transportation regarding physical qualifications for drivers of certain classifications of motor vehicles, it is the Committee's intent that a person with a disability applying for or currently holding a job subject to these standards must be able to satisfy any physical qualification standard that is job related and consistent with business necessity in order to be considered a qualified individual with a disability under Title I of this legislation.

Id. at 917, citing H.R.Rep. No. 101-485(II), 101st Cong., 2d Sess. 57 (1990) (House Education and Labor Committee), reprinted in 1990 U.S.C.C.A.N. 303, 339; S.Rep. No. 101-116, 101st Cong., 1st Sess. 27 (1989) (Senate Labor and Human Resources Committee).

The court recognized the applicant felt mistreated by Federal Express (especially since he had already passed an earlier DOT medical examination), but the court ruled that the employer was allowed to enforce its own qualitative standards for drivers, stating, "bureaucratic callousness does not equate to intentional discrimination." *Campbell* at 919.

Campbell parallels the case before this Court. The applicant in *Campbell* failed to meet Federal Express' safety requirements for a position because of a physical impairment. Thus, he was not "qualified" under the ADA. Similarly, Kirkingburg failed to meet the minimum safety requirements to allow him to drive a truck for Albertsons, and is also not "qualified" under the ADA.

Albertsons respectfully asks this Court to follow the line of reasoning found in *Campbell* to rule that Kirkingburg is not qualified under the ADA.

B. Kirkingburg could not perform the essential functions of the job.

The issue whether an individual is "qualified" under the ADA also turns on the individual's ability to perform all the essential functions of a particular job. Although the essential function element is a key component of the ADA, the statute is silent on the meaning of "essential functions."

The EEOC Regulations provide that the term "essential functions" means "the fundamental job duties of the employment position." 29 C.F.R. § 1630.2(n)(1). The EEOC also provides a list of factors used to determine whether something is an "essential function." One factor the EEOC considers when determining if a function is essential is whether the reason the position exists is to perform that function. 29 C.F.R. § 1630.2(n)(2).

1. Not required to lower its qualitative standards, or justify them

In error, the Ninth Circuit based its reversal of the District Court in part on an argument that Albertsons is required to lower its qualifications for Kirkingburg (J.A. 240, 247-248). The EEOC states:

It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such

standards.

29 C.F.R. Pt. 1630, App. § 1630(n) (Interpretive Guidance). The EEOC Technical Assistance Manual states, "[I]t is the employer's province to establish what a job is and what functions are required to perform it." EEOC Technical Assistance Manual, § 2.3(a) at page II-18. Albertsons is committed to employ only those drivers who meet the DOT minimum safety standards. Forcing Albertsons to accept any less would necessarily require a lowering of objective safety standards, which runs contrary to the EEOC's pronouncement about an employer's business judgment.¹⁸

Additionally, Albertsons is not required to justify its decision regarding the stringency of the qualitative standards applied to each position. The EEOC's Interpretive Guidance provides an example of an employer that operates a hotel and requires its service workers to clean 16 rooms per day. 29 C.F.R. Pt. 1630, App. § 1630.2(n) (Interpretive Guidance). The EEOC states that the hotel "will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement." *Id.* The EEOC also says that an employer that imposes a 75 accurate words per minute typing requirement need not explain why it requires accurate words, nor why it does not only require a 65 words per minute requirement. *Id.* Similarly, Albertsons does not have

¹⁸ See also *Milton v. Scrivner*, 53 F.3d 1118, 1124 (CA10 1995) (employer not required to lower standards for grocery selector position, such as slowing production schedules or lightening workloads, since inquiry into essential functions is not intended to second guess the employer, or to require it to lower company standards); *EEOC v. Amego, Inc.*, 110 F.3d 135, 147 (CA5 1997) (employer's high standards for team leader position did not have to be lowered, and court would not second-guess employer's business judgment regarding these standards).

to provide any justification for requiring its interstate truck drivers to meet minimum DOT vision safety regulations.

The Ninth Circuit held that Albertsons could not "adhere to only a part of the [DOT] regulations, while ignoring the waiver program" (J.A. 240). In so ruling, the court makes one error of fact and one potential error of law. In fact, the experimental waiver program was never a part of the DOT regulations. In electing not to accept the experimental waiver program, Albertsons did not accept one DOT regulation and reject another. The Company exercised its business judgment, grounded in public safety, to set its minimum vision certification by the DOT regulations. What it rejected was an experimental waiver program, conducted for the purpose of determining whether the minimum vision requirements should be modified. The vision requirements were not changed, and have been unchanged since 1970.¹⁹

The potential error of law was to take from Albertsons the very essence of business management -- its business judgment -- and set in its place a judicial determination substantively lowering the certification requirement for vision acuity: from 20/40 corrected (almost perfect 20/20 vision) to 20/200 corrected (legally blind). This is an inappropriate exercise of judicial rule making. *Cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) (this Court has emphasized that the formulation of administrative procedures was "basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments"). The DOT itself has not determined that the waiver program should apply to all employers. And

¹⁹ The DOT has expressly recognized an employer's right to set a higher safety standard than the DOT's minimum. 49 C.F.R. § 390.3(d).

while the DOT continues to grant a few waivers on a case by case basis, nowhere in its regulations does it require an employer to hire a driver with an experimental waiver.

2. Objective evidence demonstrates that driving a truck in interstate commerce is an essential function

The ADA specifically identifies two types of evidence upon which an employer may rely to prove a function is essential: the employer's own judgment as to what functions are essential, and written job descriptions prepared before advertising or interviewing applicants for the job. 42 U.S.C. § 12111(8). The EEOC Regulations reiterate these two and identify additional forms of evidence to be considered in this determination: the amount of time an employee spends on the job performing the function, the consequences of not requiring the incumbent to perform the function, the terms of a collective bargaining agreement, the work experience of past incumbents in the job, and/or the current work experience of incumbents in similar jobs. 29 C.F.R. § 1630.2(n)(3).

Analyzing the factors relevant to this case demonstrates that driving a truck in interstate commerce is an essential function of the truck driving position. First, with regard to Albertsons' own judgment, it has long required its drivers to meet the minimum DOT safety requirements. Since Kirkingburg was not able to meet the qualification standard necessary to be able to drive a truck in interstate commerce, he could not perform the essential function in Albertsons' judgment.

Second, although the job description for a truck driver is not in the record, the Company Driver Manual is and can be examined by this Court. The Driver Manual states, "...

you are required to comply with all Department of Transportation, Interstate Commerce Commission and Company safety rules." Kirkingburg, not able to satisfy the minimum DOT vision requirements, could not comply with "all Department of Transportation safety rules."

Third, with regard to the amount of time spent on the job performing the function in question, since the reason the truck driving position exists is to drive trucks in interstate commerce, it can be said that virtually the entire time spent on the job is spent driving a truck in interstate commerce.

Fourth, regarding the consequences of not requiring an incumbent truck driver to perform the function of highway driving, it is clear from the record that if truck drivers were not required to drive trucks in interstate commerce, their jobs would not exist. Driving trucks in interstate commerce is the sole function of this position.

Therefore, since Kirkingburg could not perform an essential function of the truck driving position, he is not a qualified individual under the ADA.

C. Employing Kirkingburg is a direct safety threat

The ADA expressly states that employers, when setting qualification standards, may impose a requirement "that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. §12113(b). The EEOC defines "direct threat" as "a significant risk of substantial harm to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r). The purpose of the direct threat standard is to eliminate exclusions not based on objective evidence about the individual involved. H.R. Rep. No. 101-485 (III), 101st Cong., 2d Sess. 45 (1990) (House

Judiciary Committee), reprinted in 1990 U.S.C.C.A.N. 445, 468.

This Court examined the "direct threat" analysis in *Bragdon* in the public accommodation context of a dentist who refused to treat a HIV-infected patient for fear that he might contract the virus from his patient. *Bragdon* at 2201. This Court held that the existence of a significant risk must be determined from the standpoint of the party who refuses the accommodation, and the risk assessment must be based on medical or other objective evidence. *Id.* at 2210, citing *Arline*. Implicit in the *Bragdon* and the *Arline* analyses is that the risk assessment should be based on objective evidence available at the time the employment decision is made. *Id.* at 2211 (referring to "available" medical evidence); *See also Arline* at 288 (referring to judgments made given the state of medical knowledge). Legislative history demonstrates that determination whether a person is qualified should be made at the time of the employment action. H.R. Rep. No. 101-485 (III), 101st Cong., 2d Sess. 34 (1990) (House Judiciary Committee), reprinted in 1990 U.S.C.C.A.N. 445, 456. A good faith belief that a significant risk exists does not relieve the employer of liability. *Bragdon* at 2211.

In addition, the EEOC lists the following factors in determining what constitutes objective evidence with relation to the risk assessment analysis: the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. 29 C.F.R. § 1630.2(r). Beyond these suggested factors, the legislative history of the ADA reflects the fact that overall risk to property is also an appropriate factor to consider when reviewing whether an individual poses a direct threat. S.Rep. No. 101-116, 101st Cong., 1st Sess. 27 (1989) (Senate Labor and Human Resources

Committee).²⁰ In the instant case, the imminence and the likelihood of the potential harm cannot be gauged, although the duration of the risk is permanent. Kirkingburg will *always* pose a significant risk to himself and the driving public if allowed to drive a truck in interstate commerce, as his eyesight cannot be improved by any means.

The most significant factors in this analysis are the nature and severity of the potential harm that could occur if Kirkingburg were allowed to drive a truck in interstate commerce, combined with the overall risk to property. The nature of the potential harm is a potential accident in interstate commerce involving a truck driven by Kirkingburg and another vehicle(s). The severity of the potential harm is the possible loss of life for an unknown number of individuals who happen to be on or near the highway at that time. Moreover, such an accident could lead to a negligence lawsuit against Albertsons, which could have major economic consequences. As the Fifth Circuit noted in *Chandler v. City of Dallas*, 2 F.3d 1385, 1395 (CA5 1993), *cert. denied*, 511 U.S. 1011 (1994), "[w]oe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident" (quoting *Collier v. City of Dallas*, No.86-1010, slip op. at 3 (CA5 1986) (unpublished)).

Further, although no facts exist in the record to prove the cost of a truck and automobiles in general, it is undeniable that any accident Kirkingburg would be involved in while driving a truck could cause severe and costly damage

²⁰ One Senate Report reads, "[t]he standard to be used in determining whether there is a direct threat is whether the person poses a significant risk to the safety of others *or to property*...." S.Rep. No. 101-116, 101st Cong., 1st Sess. 27 (1989) (Senate Labor and Human Resources Committee) (emphasis added).

to Albertsons' truck, trailers, cargo, and possibly other vehicles.

Kirkingburg alleges he has only been involved in one prior driving accident and that it was not his fault. This allegation does not reduce the risk of direct threat. The EEOC provides the following example to illustrate a type of individual who is "unqualified" because of the direct threat he poses: an individual with narcolepsy, who frequently and unexpectedly loses consciousness, would not be qualified for a carpentry position with essential functions including the use of power saws and other dangerous equipment. 29 C.F.R. Pt. 1630 App. § 1630.2(r) (Interpretive Guidance).

When the EEOC provided this illustration, it did not find it necessary to provide an example where the individual had been involved in prior accidents, or even where the individual had lost consciousness at work in the past. Instead, the EEOC presented a situation describing an individual whose physical impairment caused the potential for a dangerous situation to occur in the future. In fact, the common usage of the word "threat" describes a future activity, not a recurring scenario. Webster's Dictionary defines "threat" as "[a]n expression of an *intention* to inflict something harmful," or "an indication of *impending* danger or harm." WEBSTER'S II NEW COLLEGE DICTIONARY 1149 (2d ed. 1995) (emphasis added). While a history of past accidents would play a role in determining the likelihood of a safety risk, the absence of prior accidents should in no way be deemed determinative in concluding that no such risk exists.

The EEOC states that if a legitimate direct threat exists, an employer still must determine whether a reasonable accommodation would eliminate the risk or reduce it to an acceptable level. 29 C.F.R. Pt. 1630 App. § 1630.2(r) (Interpretive Guidance). Implicit in this admonition is the need to determine whether the part of the job that is affected

by the direct threat is an essential function of the job. As stated above, the part of the truck driving job that causes the direct threat (driving a truck in interstate commerce) is an essential function of the position. Therefore, the only way to eliminate the risk or reduce it to an acceptable level would be to prohibit Kirkingburg from driving a truck while employed as a truck driver. As demonstrated below, such an accommodation would not be reasonable.

Federal appellate courts that have examined whether individuals with physical impairments could cause a significant risk of harm while driving and have ruled that such individuals are not "qualified" for driving positions. For example, in *Myers v. Hose*, 50 F.3d 278, 282 (CA4 1995), the Fourth Circuit held that an individual's physical impairments (diabetes and a severe heart impairment) made him a safety risk as a bus driver because his condition would profoundly compromise the safety of his passengers, pedestrians, and other motorists. The court noted that "it is not difficult to imagine the public outrage, let alone the potential liability, if plaintiff . . . had an accident [caused by his physical impairment] . . ." *Id.*²¹

Examining this issue from Albertsons' perspective, as the *Bragdon* decision requires, demonstrates that Kirkingburg would have posed a direct threat had he been allowed to continue driving a truck in interstate commerce. Albertsons had objective medical information from a doctor that Kirkingburg's vision was far below minimum DOT safety regulations. This information demonstrates that Kirkingburg

²¹ See also *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (CA5 1995), *cert. denied*, 516 U.S. 1172 (1996) (city bus driver was discharged because his physical impairment -- diabetes -- presented a genuine substantial risk to himself and others, and was ruled not to be qualified under ADA).

posed a substantial risk of harm to himself and to others, and not just a slightly higher risk than the average binocular person.

The Ninth Circuit held that accepting Kirkingburg's experimental vision waiver, and allowing him to circumvent the minimum DOT vision requirements would be a reasonable accommodation. The Ninth Circuit touted the experimental DOT waiver program as demonstrating that monocular drivers are safer than binocular drivers by comparing the driving records of monocular drivers in the experimental waiver program with those of binocular drivers under regular DOT certification (J.A. 241). The Ninth Circuit, in making this proclamation, relied upon a study that was issued 2 years after Albertsons made the decision not to accept Kirkingburg's experimental waiver. (J.A. 241); *Qualification of Drivers*, 59 Fed. Reg. 59386, 59389 (1994). At the time Kirkingburg presented his waiver to Albertsons, the experimental program was merely a study program, conducted to determine if the DOT's vision requirements should be modified. The FHWA was undertaking the study to determine the safety of lowering the requirements. *Qualification of Drivers*, 57 Fed. Reg. 31458, 31458 (1992). Apparently, it was found that those requirements could not be safely lowered, as they have remained unchanged.

Therefore, Albertsons respectfully requests that this Court determine that Kirkingburg is not "qualified" for the position of truck driver because objective evidence demonstrates that allowing him to drive a truck in interstate commerce would pose a direct safety threat.

III. Albertsons Satisfied Any Duty it Had to Reasonably Accommodate Kirkingburg.

The ADA does not require Albertsons to lower its

standards or modify an essential function of the job to allow Kirkingburg to drive a truck. The ADA does not require an employer to consider other job positions. If this Court finds such a requirement, Albertsons met it by offering Kirkingburg work as a Tire Mechanic.

A. Kirkingburg is not an "otherwise qualified" individual with or without reasonable accommodation.

Determining whether an individual is a "qualified individual with a disability" is a two-part analysis, the first of which was analyzed above in Section II, *supra*. The second prong requires that an employee can perform the essential functions of the position with or without reasonable accommodation. 29 C.F.R. Pt. 1630, App. § 1630.2(m) (Interpretive Guidance). The EEOC describes the motivation for this second component as "to ensure that individuals with disabilities who can perform the essential functions of the position held or desired are not denied employment opportunities because they are not able to perform marginal functions of the position." *Id.*

An employer has an obligation to provide individuals who are "otherwise qualified" with reasonable accommodation. The EEOC explains the reasons for including the term "otherwise qualified" as follows:

The term "otherwise qualified" is intended to make clear that the obligation to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of section 1630.2(m) in that he or she satisfies all the skill, experience, education and other job-related selection

criteria. An individual with a disability is "otherwise qualified," in other words, if he or she is qualified for a job, except that because of the disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.

29 C.F.R. Pt. 1630, App. § 1630.9 (Interpretive Guidance).²²

²² The ADA's legislative history and the EEOC Interpretive Guidance also provide an example demonstrating the interrelationship between the concepts of "qualified" and "reasonable accommodation." A law firm requiring all incoming lawyers to have graduated from an accredited law school and passed the bar examination need not provide an accommodation to an individual with a visual impairment who has not met these selection criteria. S.Rep. No. 101-116, 101st Cong., 1st Sess. 33 (1989) (Senate Labor and Human Resources Committee). Even if the reason the individual did not graduate from an accredited law school is a vision impairment, the applicant is not entitled to a reasonable accommodation because he or she is not "otherwise qualified" for the position. *Id.* The EEOC adopted this legislative history. 29 C.F.R. Pt. 1630, App. § 1630.9 (Interpretive Guidance).

The situation is different if the attorney applicant with a visual impairment has graduated from an accredited law school and passed the bar examination. S.Rep. No. 101-116 at 33-34. In that case, the legislative history provides that the individual would be "otherwise qualified," and the law firm would be required to provide a reasonable accommodation (such as providing a machine that magnifies print) to enable the individual to perform the essential functions of the attorney position, unless the necessary accommodation would impose an undue hardship on the law firm. *Id.* at 34.

In the law firm example, the employer's objective standards are set in reference to criteria external to the work place: law school accreditation and passing an exam established by the state regulating agency. Here, the external criteria used to determine whether Kirkingburg or any truck driver applicant or incumbent was qualified for the position of interstate truck driver was Albertsons' requirement that he or she meet the minimum safety standards in the DOT Regulations.

Kirkingburg is not an "otherwise qualified individual" entitled to a reasonable accommodation. Meeting minimum DOT safety requirements is a prerequisite for Kirkingburg's job as a truck driver for Albertsons. He was unable to perform an essential function of his job as a truck driver for Albertsons because he was unable to meet minimum DOT safety standards. No accommodation exists -- no visual aid or other prosthetic device -- that would render Kirkingburg able to meet the minimum visual acuity standards set forth in the DOT regulations. Albertsons was not obligated to waive satisfaction of the minimum DOT safety standards, because meeting those requirements was a job-related safety standard required of all interstate truck drivers.

B. Waiving minimum requirements is not a reasonable accommodation.

The Secretary of Transportation is charged with ensuring that "the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely." 49 U.S.C. § 31136(a)(3). The FHWA promulgates the DOT regulations to meet that obligation, and Albertsons requires all of its interstate truck drivers to meet the minimum DOT safety regulations. The evidence is uncontroverted that Kirkingburg does not meet the minimum visual acuity requirements set forth in 49 C.F.R. § 391.41(b)(10).

The experimental waiver program at issue here was conducted to evaluate the viability of excepting certain drivers who failed to meet minimum DOT vision requirements for the purpose of gathering empirical data and determining whether to lower the statutory visual acuity requirements. Specifically, the stated purpose of the waiver experiment was as follows:

[T]he proposed waiver program will enable the FHWA to conduct a study comparing a group of experienced visually deficient drivers with a control group of experienced drivers who meet the federal vision requirements.

Qualification of Drivers, 57 Fed. Reg. 23370, 23370 (1992).

In short, the experimental waiver program was implemented to see how safe (or unsafe) drivers who did not meet the current vision standards in 49 C.F.R. § 391.41(b)(10) might be. The ultimate goal of the FHWA in experimenting with a vision waiver program was to evaluate and assess the risk of lowering the established minimum DOT visual acuity requirements to pursue the spirit of the ADA. Qualification of Drivers, 57 Fed. Reg. 6793, 6793 (1992); see also H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 57 (1990) (House Committee on Education and Labor), reprinted in 1990 U.S.C.C.A.N. 303, 339.

Contrary to the findings of the Ninth Circuit, the experimental waiver program itself was not, nor was it intended to be, a direct method of complying with the ADA. The program was an experimental study to gather data and determine whether changes to the minimum qualifications were viable; and, if so, to assess whether the changes should eventually be adopted as modifications in the minimum DOT regulations.

The experimental vision waiver program started granting waivers in July of 1992. Kirkingburg was terminated in November of 1992. The experimental waiver program has not been adopted into the minimum DOT safety requirements and the DOT vision requirements remain unchanged. Albertsons should not be required to accept an experimental waiver of the minimum vision safety standards which it requires all its drivers to meet.

C. No obligation to reassign as a reasonable accommodation

The ADA defines the term "qualified individual with a disability" as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires. 42 U.S.C. § 12111(8). The Act further provides that reasonable accommodation "may include" reassignment to another position. 42 U.S.C. § 12111(9).

Subsequently, several courts adopted the view that an employer has an affirmative duty to reassign a qualified individual, when the individual cannot be reasonably accommodated to perform the essential functions in the employee's current position.²³ This interpretation goes beyond the ADA's intended mandate of an employer's obligations.²⁴

An employee does not meet the ADA's definition of "qualified individual with a disability" if the employer cannot reasonably accommodate the employee in the employee's current position. Further, requiring an employer to reassign an employee as a reasonable accommodation results in affirmative action in favor of an individual with disabilities. The ADA was designed to prohibit discrimination against qualified individuals, not to require affirmative action in

²³ See, e.g., *Monette v. Electronic Data Systems*, 90 F.3d 1173 (CA6 1996).

²⁴ If this Court determines that Congress has not directly addressed this issue, or that the ADA is ambiguous, the question for this Court is "whether the agency's answer is based on a permissible construction of the statute." *Chevron* at 842-843.

favor of them. See 42 U.S.C. § 12101(b)(1); see also *Daugherty* at 700.

Compare the ADA's suggestion of reassignment as a reasonable accommodation to state workers' compensation statutes. Many workers' compensation schemes include an affirmative duty for the employer to reinstate employees who suffered on-the-job injuries to other positions if the employee returns to work unable to perform the employee's original job, or if the job is no longer available.²⁵ In the workers' compensation context, expansive reinstatement obligations make sense as a matter of public policy. The employer's duty is appropriately heightened in that situation because the employee was injured on the job.

The goal of the ADA is to ensure equal treatment for qualified individuals with a disability.²⁶ To interpret the ADA to require employers to reassign employees who are unable to perform the essential functions of their job at injury to some other available and suitable position would convert the ADA into a form of super workers' compensation statute, a result not intended by the legislature.

An employer must have some point at which it has met its obligations under the ADA. Allowing an employee to reject position after position -- without relieving the obligation of the employer -- is counterintuitive to the direction provided in the statute.

Albertsons went beyond any obligation under the ADA to reasonably accommodate Kirkingburg by offering to

²⁵ See, e.g., O.R.S. § 659.420 (Oregon); FL ST § 440.15 (Florida).

²⁶ If that disability arose on the job, the various state workers' compensation statutes will afford the employee the additional protection of that system.

reassign him to a job as a Tire Mechanic. Kirkingburg refused the offer. Even assuming he was otherwise entitled to the protection of the ADA, Kirkingburg lost the protection when he rejected Albertsons' offer to transfer him to the position of Tire Mechanic. 29 C.F.R. § 1630.9(d).

D. No reasonable accommodation required in cases where an individual is "regarded" as disabled.

The underlying goal of accommodation is to remove a barrier to enable an employee to perform the essential functions of his or her job. EEOC Technical Assistance Manual § 3.2, page III-2; see also 29 C.F.R. Pt. 1630, App. §1630.9(a) (Interpretive Guidance). In the case of individuals who are merely "regarded as" having a disability, the single workplace barrier at issue is the attitude of the employer and, consequently, the employer's alleged discrimination against the individual based on the perceived disability. The EEOC states "persons who are *regarded* as having a substantially limiting impairment are not entitled to reasonable accommodation." EEOC ADA Case Study Training Manual 1996, C.S.1 at page 6 (emphasis in original).

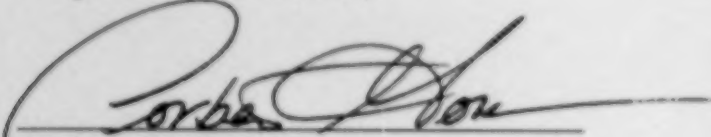
An individual who is regarded as disabled does not need a reasonable accommodation in order to perform the essential functions of his or her job. The employer's obligation is simply to remove the barrier of a false perception.

CONCLUSION

For the foregoing reasons, Albertsons respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit. This Court

should hold that Kirkingburg does not have a "disability" as defined in the Americans with Disabilities Act. In the alternative, this Court should hold that Kirkingburg is not a "qualified individual with a disability," or that Albertsons satisfied its reasonable accommodation obligation.

Respectfully Submitted,



Corbett Gordon

Counsel of Record

Heidi Guettler

Richard R. Meneghello

Kelliss Collins

Corbett Gordon & Associates, P.C.

1001 SW 5th Avenue, Suite 1600

Portland, Oregon 97204

(503) 242-4262

Counsel for Petitioner